

Competitors for the Majority

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Maximilian Steinbeis Fr 8 Nov
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Why should a country like Germany, with the AfD currently at 12% in Parliament and at 15% in the polls, be worried about a far-right takeover? I hear this a lot since I've published an article in *Süddeutsche Zeitung* a few weeks ago about how an authoritarian populist majority could use the gaps in the constitutional setup of Germany to overthrow the entire constitution without breaking a single law. Oh, come on, people tell me, stop the scaremongering already, will you? Haven't we just celebrated the 70th anniversary of the *Grundgesetz* and assured each other over and over again how fantastic and stable and robust our constitution is? How realistic is it to expect such an authoritarian majority any time soon, anyway? What could such a hypothetical scenario possibly teach us? Why cross that bridge before we even get to it?

The thing is: the AfD is a competitor for the democratic majority, not in some distant hypothetical future, but here and now.

A democratic competition for the majority is what keeps society diverse and dynamic and is both the reason and the condition for democracies being more robust than authoritarian or even totalitarian systems. But that is only because and to the extent that the outvoted can afford to be outvoted. For that, it takes a robust constitution. It takes strong fundamental rights that protect your existential interests from the majority. It takes strong procedural rules that keep competition for the majority open. It takes strong, independent courts to enforce these rights, if necessary, against the majority.

But what if one competes for the majority with people who, quite regardless of majorities or minorities, equate their aims and methods with the "true will of the people" from the outset? Before one can afford to even enter into a competition with them, one must be sure that they, should they win, won't use the power they have gained to turn their own self-identification with the "will of the people" into a self-fulfilling prophecy and to forge the constitutional institutions and procedures into tools of their own power.

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ICON-S ITALIAN CHAPTER CONFERENCE

On November 22-23, 2019 the University of Florence will host the second conference of ICON-S Italian Chapter. The conference will feature two plenary sessions and 112 panels. It will investigate the legal-theoretical, practical, and institutional challenges posed by technological developments, and in particular the implications of digital technologies, neurosciences, and genomics for contemporary legal systems. [Program here](#).



This is the reason why I worry about the robustness of the *Grundgesetz* right now and not just at some hypothetical point when a AfD majority might appear more realistic (quite apart from the fact that it would be much too late then, anyway): Most of their political opponents, including the CDU, praised be the Lord, are very much aware that they cannot simply treat this party as an ordinary competitor for the majority like everyone else. They try to deny the AfD access to all sorts of otherwise non-partisan institutions, which is a most laudable effort per se, of course, but comes at a price: not only they provide the AfD with constant new occasions to complain how rigged and corrupt the system is, but also it unravels the web of informal conventions of fairness on which the formal body of constitutional law rests – all those small concessions of the majority that make being in the minority endurable and thus contribute to the functionality of democracy.

The President of the Bundestag, for example

This week I had the pleasure of sitting on a podium with Norbert Lammert, former President of the *Bundestag* for many years and currently Chairman of the CDU-supportive and -supported Konrad Adenauer Foundation. I asked him what he thought would happen if the AfD became the relatively strongest group in the Bundestag. As such, according to parliamentary convention, the AfD would be entitled to claim the presidency of the parliament. Lammert did not hesitate: that, he answered, would be the end of this convention. It would be completely unthinkable to hand over this eminently political office to the AfD as long as there is a majority to keep it from them.

I entirely agree. The President of the *Bundestag* is, among other things, in charge of controlling the observance of the rules of the national party financing and metes out substantial fines against parties who are found in violation (the AfD is currently under investigation in that respect). The idea that this office would one day be discharged by, say, Stefan Brandner – that would be completely mad.

To change the rules is one way of resolving the dilemma. Another would be to take a critical look at the position of the President of Parliament: why is this such a political office in the first place? And if it is, why on earth is it assigned the task of monitoring party funding? Maybe that's just not the optimal way to regulate these things constitutionally, in such challenging times as these?

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The Journal of Constitutional Law in the Middle East and North Africa is a double-blind peer-reviewed journal launched in partnership between the Arab Association of Constitutional Law (AACL) and the Rule of Law Programme Middle East/North Africa of Konrad Adenauer Stiftung (KAS).

The Journal is a venue for scholarly analysis on issues related to constitutions and constitutional law throughout the MENA region. The Journal's objective is to improve access to information, encourage greater discussion about constitutional and legal developments in the region and to increase debate about these developments amongst the international community of practitioners and scholars.

The Editorial Board is pleased to invite submissions for its first edition of the Journal of Constitutional Law in the Middle East and North Africa, which will be published online in March 2020. The Editorial Board warmly welcomes submissions of papers, in English, on themes related to constitutional law and constitutional legal developments in the MENA region.

Interested authors are asked to submit their manuscripts to Journal.contact@dustour.org.

I'm not saying that the *Grundgesetz* could be made totally storm-proof to a point where the scenario of an AfD majority would entirely lose its terror. That would be utterly naive, of course. All I'm saying is that there is a correlation between the robustness of the Constitution and the functioning of competition for the majority. And that to find answers to the question under what constitutional conditions a hypothetical AfD majority might be a less frightening scenario than it is now, might be worthwhile effort. Not just eventually. Right now.

A great opportunity to enter into this debate has been missed this week: On Thursday, the Federal and State Justice Ministers of Germany discussed a proposal by Hamburg's Justice Senator Till Steffen (Greens) under the title "Making the *Grundgesetz* crisis-proof", apparently inspired by my "People's Chancellor" scenario a few weeks ago. At the core of the proposal was the observation how vulnerable the Federal Constitutional Court would be in the case of an authoritarian populist majority which could manipulate the setup and the procedural law of the FCC freely. Steffen suggested two alternative options:

either transferring large parts of the competence to regulate its internal business to the Court itself. Or making the two-thirds majority required to elect FCC judges a constitutional provision which then could only be altered by a two-thirds majority as well.

Particularly the latter solution enjoys little sympathy in Karlsruhe itself, so far, because of well-grounded fears of blocking minorities, which may have played a prominent role for the Justice Ministers as well. There are, however, other solutions apart from the ones put forward by Steffen, such as making amendments to the Federal Constitutional Court Act dependent on the agreement of the court (which is, after all, a *Verfassungsorgan*). Either way, I would be glad if there were at least a tableau of the different options with their respective advantages and disadvantages.

Steffen's colleagues, however, had no desire to let any crisis scenario disturb their celebratory mood in this year of the 70th anniversary of the wonderful Grundgesetz and the 30th of the fall of the Berlin Wall, and instead contented themselves with a solemn declaration about the *Grundgesetz* being the guarantor for our free democracy etc. on which any further word would be wasted.

Well, well.

We'll see.

Unbearable

Speaking of Stefan Brandner: this unspeakable man is currently the chairman of the Legal Committee of the German Bundestag, an appointment he owes to the usual consensual package deal between parliamentary groups. No more consensus now, however: The other parliamentary groups have agreed to relieve Brandner of that office. Any legal qualms they had have been dissolved by CHRISTOPH SCHÖNBERGER who claims that the problem is not legal but political: Of course the majority can unseat Brandner at any time if it so wishes. The downside, though, is clear: there goes another constitutional convention in favour of the minority.

In **Germany**, the constitutional event of this week was undoubtedly the decision of the Federal Constitutional Court on sanctioning unemployed people who don't cooperate the way the agency expects them to. Social security must cover the minimum of existence as a matter of human dignity, according to the FCC's previous case law, so how can this minimum be further reduced as a sanction? ALEXANDER THIELE reads this week's decision as a piece of "apertistic liberalism" that opens the door to a proportionality test of human dignity infringements. MATHIAS HONG disagrees.

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MAX-PLANCK-INSTITUT

FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT

Award Ceremony Max Planck-Cambridge Prize for International Law (MaxCamPIL) on 15 November

The Max Planck Institute for Comparative Public Law and International Law of Heidelberg and the Lauterpacht Centre for International Law at the University of Cambridge are delighted to announce that the inaugural Max Planck-Cambridge Prize for International Law (MaxCamPIL) has been awarded to Nico Krisch (Graduate Institute for International and Development Studies). Nico Krisch will receive the Prize at a ceremony to be held in Heidelberg on 15 November 2019. Further information [here](#).

In **Brazil**, the right-wing extremist son of the right-wing extremist president is taken to court for his praise of the torture regime of the military dictatorship in the 1960s. The president's allies are already concocting a "court packing scheme" for the Supreme Court. EMILIO PELUSO NEDER MEYER, THOMAS BUSTAMANTE and MARCELO CATTONI tell what is going on.

Citizens have been protesting in **Lebanon** for weeks, with remarkable stamina and success. ROBERT POLL examines how the rebellion affects the constitutional balance in the multi-religious state and whether it could eventually turn into a revolution.

Protests are also taking place in **Chile**, too, and there is tremendously much at stake, as well. SERGIO VERDUGO warns against placing too much hope in a constitutional renewal of the country.

The **United Kingdom**, a far-too-little-known fact, is not just Greater England but consists of four distinct nations, one of which, Scotland, voted 62% against Brexit and now will have to leave against its will nonetheless. SIONAIDH DOUGLAS-SCOTT explains how this will affect the prospects for a second independence referendum for Scotland.

What is also often overlooked is the impact of Brexit on **Romanian** and **Bulgarian** workers in the UK. RALUCA BEJAN reminds both the British government and the EU of their responsibilities towards this already marginalised group.

In **Germany**, the government wants to speed up administrative approval procedures for infrastructure projects at the expense of legal protection of citizens. THOMAS GROSS shows that this is in conflict with constitutional and European law.

Elsewhere

DIRK VOORHOOF and RONAN Ó FATAIGH are celebrating a ECtHR judgment according to which **Hungary** violates journalist's freedom of expression by denying them access to the notorious "reception centres" for refugees.

FRANK DECKER calls for a competition of ideas to find new ways to democratize the **EU** after the failure of the *spitzenkandidaten* process in the election of the Commission President.

AZZA REKIK, after the election of constitutional law professor Kaïs Saïed as President of **Tunisia**, expects the state structure to become more presidential.

ANNA WÓJCIK summarises the latest ECJ ruling in the case of forced retirement of **Polish** judges.

ALICIA LISSIDINI reports disturbing tendencies in **Uruguay**, Latin America's model democracy to date.

ALAN RENWICK, MEG RUSSELL and LISA JAMES answer five key questions about a new Brexit referendum in the **UK**.

ISRAA SABER examines the prospects for democratization in **Sudan**.

That's it for this week. Stay safe, and if you haven't already supported us on Steady, you are as always warmly encouraged to do so without further procrastination.

All best,

Max Steinbeis

P.S. ahemm, sorry to be a pest, but you know, without further procrastination means, like: right now. You won't do it at some later, more convenient time. You just won't. Believe me.



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All the best, *Max Steinbeis*

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